

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEREK WHITE,) NO. CV 07-44-JVS (E)
)
Petitioner,)
)
v.) ORDER ADOPTING FINDINGS,
)
JAMES YATES, Warden,) CONCLUSIONS AND RECOMMENDATIONS
)
Respondent.) OF UNITED STATES MAGISTRATE JUDGE
)
)

Pursuant to 28 U.S.C. § 636, the Court has reviewed the
Petition, all of the records herein and the attached Report and
Recommendation of United States Magistrate Judge. The Court approves
and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing
the Petition with prejudice.

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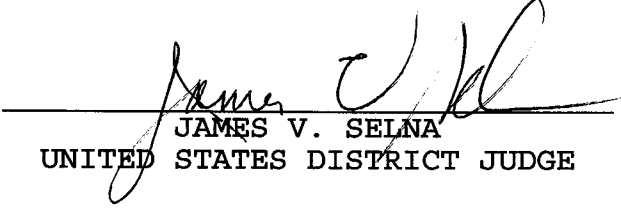
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1 IT IS FURTHER ORDERED that the Clerk serve copies of this
2 Order, the Magistrate Judge's Report and Recommendation and the
3 Judgment herein by United States mail on Petitioner and counsel for
4 Respondent.

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6 LET JUDGMENT BE ENTERED ACCORDINGLY.

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8 DATED: 4.16, 2008.

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11 JAMES V. SELNA
12 UNITED STATES DISTRICT JUDGE
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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 DEREK WHITE,) NO. CV 07-44-JVS(E)
12 Petitioner,)
13)
14 v.) REPORT AND RECOMMENDATION OF
15 JAMES YATES, Warden,) UNITED STATES MAGISTRATE JUDGE
16 Respondent.)
_____)

17 This Report and Recommendation is submitted to the Honorable
18 James V. Selna, United States District Judge, pursuant to 28 U.S.C.
19 section 636 and General Order 05-07 of the United States District
20 Court for the Central District of California.
21

22 PROCEEDINGS
23

24 Petitioner filed a "Petition for Writ of Habeas Corpus By a
25 Person in State Custody" on January 3, 2007 ("Petition"), accompanied
26 by a Memorandum of Points and Authorities ("Pet. Mem.") and
27 Petitioner's Declaration ("Pet. Dec."). Respondent filed an Answer on
28 May 25, 2007, alleging, inter alia, that some of Petitioner's claims

1 were unexhausted. On July 16, 2007, Petitioner filed a response to
2 the Answer.

3
4 On July 25, 2007, the Court issued an "Order re Exhaustion
5 Issues," deeming the following claims to be unexhausted:

6
7 1. Petitioner's claims that his plea was invalid because he
8 assertedly was not told that the plea agreement called for a term of
9 ten years and four months and because Petitioner allegedly did not
10 have sufficient time to consult with counsel or consider the
11 advisability of accepting the plea bargain; and

12
13 2. Petitioner's claims that the trial court abused its
14 discretion in accepting Petitioner's plea without inquiring into
15 Petitioner's reasons for accepting the plea, and without ascertaining
16 that Petitioner's counsel allegedly had told Petitioner that
17 Petitioner would receive a sentence of seven years and four months.

18
19 The Court ordered Petitioner to file, within thirty days of the
20 date of the Order, either: (1) a document stating Petitioner's intent
21 to amend the Petition to delete and abandon Petitioner's unexhausted
22 claims; or (2) a document requesting dismissal of the entire Petition
23 without prejudice; or (3) a motion for a stay pursuant to Rhines v.
24 Weber.

25
26 On August 6, 2007, Petitioner filed an "Ex Parte Motion to Delete
27 and Abandon Exhausted Claims," indicating Petitioner's intent to
28 abandon his unexhausted claims. On August 8, 2007, the Court issued a

1 minute order: (1) directing Respondent to file a Supplemental Answer
2 addressing the merits of the claims identified as exhausted in the
3 Court's "Order re Exhaustion Issues" (to the extent Respondent did not
4 previously address the merits of those claims in the Answer); and
5 (2) affording Petitioner an opportunity to file a Supplemental Reply.
6

7 On December 18, 2007, Respondent filed a Supplemental Answer.
8 On February 7, 2008, Petitioner filed "Petitioner's Response to
9 Respondent's Supplemental Answer, etc.," which the Court construes as
10 Petitioner's Supplemental Reply.
11

12 BACKGROUND 13

14 An Amended Information charged Petitioner with two counts of
15 robbery in violation of California Penal Code section 211, two counts
16 of kidnapping for robbery in violation of California Penal Code
17 section 209(b)(1), one count of commercial burglary in violation of
18 California Penal Code section 459, and two counts of making criminal
19 threats in violation of California Penal Code section 422 (Clerk's
20 Transcript ["C.T."] 105-07). The Amended Information further alleged
21 that: (1) Petitioner had personally used a firearm in the commission
22 of the robberies and the burglary within the meaning of California
23 Penal Code sections 12022.53(b) and 12022.5(a); and (2) Petitioner had
24 served three prior prison terms within the meaning of California Penal
25 Code section 667.5 (C.T. 105-07). On July 22, 2004, the trial court
26 granted Petitioner's motion to set aside the two aggravated kidnapping
27 counts pursuant to California Penal Code section 995 (C.T. 133).
28 ///

1 Voir dire commenced on September 21, 2004 (C.T. 146). On
2 September 23, 2004, counsel gave opening statements and the
3 prosecution began presenting its case (C.T. 152).
4

5 The next day, September 24, 2004, Petitioner pleaded no contest,
6 pursuant to a plea agreement, to two counts of robbery, admitted an
7 allegation that a principal was armed with a firearm in the commission
8 of the robberies within the meaning of California Penal Code section
9 12022(a)(1), and admitted the prior prison term allegations (C.T. 154-
10 55; Reporter's Transcript of Proceedings on April 23, 2004,
11 September 20, 2004 and September 24, 2004 ["R.T."] 28-36). On
12 October 28, 2004, the court sentenced Petitioner to a total term of
13 ten years and four months (Reporter's Transcript of Proceedings on
14 October 28, 2004 ["Sentencing R.T."] 11-12). The sentencing court
15 also ordered Petitioner to pay a restitution fund fine of "\$200 per
16 year in state prison or \$2,000 pursuant to [California Penal Code
17 section] 1202.4," and imposed, but suspended, a parole revocation fine
18 of \$200 (Sentencing R.T. 12). The court also ordered Petitioner to
19 pay restitution to the two victims in the stipulated sum of \$37,000
20 (Sentencing R.T. 11-12).
21

22 On appeal, Petitioner's counsel filed a "no merit" brief in the
23 California Court of Appeal pursuant to People v. Wende, 25 Cal. 3d
24 436, 158 Cal. Rptr. 839, 600 P.2d 1071 (1979) (Respondent's Lodgment
25 3). Petitioner filed a pro se supplemental brief in the Court of
26 Appeal (Respondent's Lodgment 4). On January 10, 2006, the Court of
27 Appeal affirmed the judgment, ruling that Petitioner's appellate
28 counsel had "fully complied with his responsibilities" and that "no

1 arguable issues exist[ed]" (Respondent's Lodgment 5).

2
3 Petitioner then filed a habeas corpus petition in the Los Angeles
4 County Superior Court, which that court denied on March 23, 2006
5 (Respondent's Lodgments 6, 7). Petitioner filed a habeas corpus
6 petition in the California Court of Appeal, which that court denied on
7 April 18, 2006 (Respondent's Lodgments 8, 9). Petitioner filed a
8 habeas corpus petition in the California Supreme Court on March 23,
9 2006 (Respondent's Lodgment 10). On November 29, 2006, the California
10 Supreme Court denied the petition with a citation to People v. Duvall,
11 9 Cal. 4th 464, 474, 37 Cal. Rptr. 2d 259, 886 P.2d 1252 (1995)
12 ("Duvall") (Respondent's Lodgment 11).¹

13
14 **PETITIONER'S CONTENTIONS**

15
16 Petitioner contends:

17
18
19 ¹ The citation to Duvall refers to the California rule
20 requiring a California habeas petitioner to state fully and with
21 particularity the facts upon which relief is sought. See Duvall,
22 9 Cal. 4th at 474 (citing, inter alia, In re Swain, 34 Cal. 2d
23 300, 304, 209 P.2d 793 (1949)); see also Gaston v. Palmer, 417
24 F.3d 1030, 1036-39 (9th Cir. 2005), modified 447 F.3d 1165 (9th
25 Cir. 2006), cert. denied, 127 S. Ct. 979 (2007) (describing
26 pleading requirements of Duvall and Swain). Where the California
27 Supreme Court denies a habeas petition with citations Duvall or
28 Swain, a federal habeas court must examine independently the
sufficiency of the petitioner's California Supreme Court
petition, and will reach the merits of the claims only where the
state petition presented the claims "with as much particularity
as is practicable." Kim v. Villalobos, 799 F.2d 1317, 1320 (9th
Cir. 1986) ("Kim"). In the "Order re Exhaustion Issues," the
Court deemed Petitioner's California Supreme Court petition to
have presented sufficiently the claims alleged therein under the
Kim standard.

1 1. Petitioner's trial counsel assertedly rendered ineffective
2 assistance by:

3
4 a. Allegedly failing to cross-examine prosecution witnesses
5 adequately (Pet. Mem., pp. 18-29);²

6
7 b. Allegedly coercing Petitioner to accept a plea bargain
8 by assertedly falsely telling Petitioner, during the third day of
9 trial, that the prosecutor had "new case law" permitting the
10 prosecutor to refile the aggravated kidnapping charges and seek a
11 life sentence (Pet. Mem., pp. 12-13, 16; Pet. Dec., pp. 3-5); and
12

13 c. Allegedly failing to investigate and subpoena potential
14 defense witnesses concerning Petitioner's asserted sales of
15 cellphones, and allegedly lying to potential defense witnesses to
16 discourage them from testifying (Pet. Mem., pp. 17-18; Pet. Dec.,
17 p. 4);
18

19 2. The order requiring Petitioner to pay restitution assertedly
20 in excess of \$39,000 allegedly violated Petitioner's plea agreement
21 (Pet. Mem., pp. 5-11, 21-24); and
22

23 3. The trial court allegedly erred in failing to find that
24 Petitioner had the ability to pay restitution (Pet. Mem., pp. 27-28).
25

26 ² Although the heading of this sub-claim alleges counsel
27 failed to "interview" prosecution witnesses, the body of the sub-
28 claim indicates Petitioner alleges counsel failed adequately to
cross-examine two of the prosecution's witnesses, a parole
officer and a car painter (see Pet. Mem., pp. 18-19).

1 4. Petitioner's appellate counsel assertedly rendered
2 ineffective assistance by:

3
4 a. Failing to challenge on direct appeal the
5 constitutionality of the alleged "increase in the restitution
6 amount" (Pet. Mem., pp. 20-21); and

7
8 b. Failing to raise on appeal Petitioner's claims of
9 ineffective assistance of trial counsel (Pet. Mem., p. 21);
10

11 **STANDARD OF REVIEW**
12

13 A federal court may not grant an application for writ of habeas
14 corpus on behalf of a person in state custody with respect to any
15 claim that was adjudicated on the merits in state court proceedings
16 unless the adjudication of the claim: (1) "resulted in a decision that
17 was contrary to, or involved an unreasonable application of, clearly
18 established Federal law, as determined by the Supreme Court of the
19 United States"; or (2) "resulted in a decision that was based on an
20 unreasonable determination of the facts in light of the evidence
21 presented in the State court proceeding." 28 U.S.C. § 2254(d) (as
22 amended); see also Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002);
23 Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S.
24 362, 405-09 (2000).
25

26 "Clearly established Federal law" refers to the governing legal
27 principle or principles set forth by the Supreme Court at the time the
28 state court renders its decision. Lockyer v. Andrade, 538 U.S. 63

1 (2003). A state court's decision is "contrary to" clearly established
2 Federal law if: (1) it applies a rule that contradicts governing
3 Supreme Court law; or (2) it "confronts a set of facts . . .
4 materially indistinguishable" from a decision of the Supreme Court but
5 reaches a different result. See Early v. Packer, 537 U.S. at 8
6 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

7
8 Under the "unreasonable application prong" of section 2254(d)(1),
9 a federal court may grant habeas relief "based on the application of a
10 governing legal principle to a set of facts different from those of
11 the case in which the principle was announced." Lockyer v. Andrade,
12 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537
13 U.S. at 24-26 (state court decision "involves an unreasonable
14 application" of clearly established federal law if it identifies the
15 correct governing Supreme Court law but unreasonably applies the law
16 to the facts).

17
18 A state court's decision "involves an unreasonable application of
19 [Supreme Court] precedent if the state court either unreasonably
20 extends a legal principle from [Supreme Court] precedent to a new
21 context where it should not apply, or unreasonably refuses to extend
22 that principle to a new context where it should apply." Williams v.
23 Taylor, 529 U.S. at 407 (citation omitted).

24
25 "In order for a federal court to find a state court's application
26 of [Supreme Court] precedent 'unreasonable,' the state court's
27 decision must have been more than incorrect or erroneous." Wiggins v.
28 Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state

1 court's application must have been 'objectively unreasonable.'" Id.
2 at 520-21 (citation omitted); see also Clark v. Murphy, 331 F.3d 1062,
3 1068 (9th Cir.), cert. denied, 540 U.S. 968 (2003).

4
5 In applying these standards, this Court looks to the last
6 reasoned state court decision. See Franklin v. Johnson, 290 F.3d
7 1223, 1233 n.3 (9th Cir. 2002). Where no such reasoned opinion
8 exists, as where a state court rejected a claim in an unreasoned
9 order, this Court must conduct an independent review to determine
10 whether the decisions were contrary to, or involved an unreasonable
11 application of, "clearly established" Supreme Court precedent. See
12 Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

13
14 **DISCUSSION**

15
16 For the reasons discussed below, the Petition should be denied
17 and dismissed on the merits with prejudice.³

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25 _____
26 ³ The Court has read, considered and rejected on the
27 merits all of Petitioner's contentions. The Court discusses
28 Petitioner's principal contentions herein.

1 I. Petitioner's Claims of Ineffective Assistance of Trial Counsel Do
2 Not Merit Habeas Relief.

3
4 A. Claim that Counsel Allegedly Coerced Petitioner to Accept a
5 Plea Bargain

6
7 1. Background
8

9 At the preliminary hearing on October 3, 2003, Eric Arm testified
10 that, on February 12, 2003, Arm was at his recording studio business
11 with his business partner, Brian Murphy (C.T. 39-40). Arm said he had
12 received telephone calls the previous evening from someone indicating
13 an interest in buying some recording equipment (C.T. 40-42). The next
14 day, Petitioner and another man assertedly appeared at the studio
15 (C.T. 42-43). Arm allegedly had put the equipment about which the
16 caller had inquired in the front entry, or lounge area, of the
17 business (C.T. 43). Petitioner allegedly said he had a tape to try
18 out the equipment, and handed Arm the tape (C.T. 44).
19

20 Arm testified that, as he was putting the tape in the machine, he
21 heard Petitioner say: "Shut up. Get down on the floor" (C.T. 44).
22 Arm allegedly turned and saw Petitioner pointing a gun at Arm and
23 Murphy (C.T. 44-45). Arm said he and Murphy got face down on the
24 floor (C.T. 45). One of the men assertedly tied the victims up and
25 put a towel over Arm's head (C.T. 45-46). One of the men allegedly
26 said: "If you guys don't shut up, I'm going to have to get the
27 silencer" (C.T. 46). Arm assertedly understood this comment to mean
28 that the man was willing to put a silencer on the gun and kill the

1 victims (C.T. 46). Arm believed Petitioner had made this comment
2 (C.T. 46-47).

3
4 According to Arm, the men asked what was behind various doors,
5 and Arm explained the layout (C.T. 48). The men allegedly asked Arm
6 if anyone else was there, or if they were expecting anyone to come by,
7 and Arm answered "no" (C.T. 48). Arm then allegedly heard doors
8 opening (C.T. 48).

9
10 The men then assertedly carried Arm and Murphy into the "live
11 room" and put them face down on the floor (C.T. 48). Arm said the
12 distance to the live room was eight to ten feet (C.T. 49). Later, the
13 men allegedly moved the victims into an "isolation room" approximately
14 fifteen to twenty feet from the live room (C.T. 49-50). One of the
15 men allegedly came in and inquired into the location of tools and
16 whether there were any security cameras (C.T. 50). Arm testified
17 that, when Arm said there were no security cameras, the man said: "You
18 better hope to God we don't find any" (C.T. 50).

19
20 Arm testified that, after a period of silence, Arm and Murphy got
21 up and walked into the lounge (C.T. 51). Arm allegedly was on the
22 phone with a 911 operator when he heard Murphy yell: "The cops are on
23 their way. Get out of here." (C.T. 51). Arm allegedly became
24 "completely terrified" when he heard a door slam, and he dropped the
25 phone and crawled under a desk (C.T. 51). Arm said that the total
26 value of the property taken was approximately \$45,000 (C.T. 52).

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1 Murphy testified that, when Petitioner told Murphy and Arm to get
2 down on the floor, Petitioner told the other man to tie the victims
3 up, and said: "I'm going to put the silencer on and do these bitches"
4 (C.T. 62). Murphy said the other man moved Murphy from the lobby to
5 the live room, which Murphy said was a distance of "15, 20 feet" (C.T.
6 64). According to Murphy, the distance of the second move from the
7 live room to the isolation room was "maybe 10 to 12 feet" (C.T. 65).
8

9 Murphy said that, after he and Arm arose and went to call 911,
10 Murphy saw Petitioner and told Petitioner "You guys better get out of
11 here. We called 9-1-1" (C.T. 67). Murphy saw Petitioner run to a
12 black or dark color Toyota truck parked in the alley and flee in the
13 truck (C.T. 67-68).
14

15 The original Information charged Petitioner with two counts of
16 kidnapping, two counts of robbery, and one count of commercial
17 burglary (C.T. 76-80). On April 12, 2004, Petitioner's counsel filed
18 a motion to dismiss the kidnapping charges pursuant to California
19 Penal Code section 995 (C.T. 87-91). Counsel argued that, under
20 allegedly then-applicable California law, proof of simple kidnapping
21 required proof of a "substantial movement" of the victim, and that the
22 preliminary hearing testimony showed that the perpetrators had moved
23 the victims only a short distance in order to clear a path for the
24 equipment they intended to steal (C.T. 87-91).
25

26 On May 12, 2004, the prosecution filed an Amended Information
27 charging Petitioner with two counts of kidnapping for the purpose of
28 robbery, two counts of robbery, one count of commercial burglary, and

1 two counts of making criminal threats (C.T. 105-09). The aggravating
2 kidnapping charges carried a life sentence. See Cal. Penal Code §
3 209(b). On June 23, 2004, Petitioner's counsel filed a motion to
4 dismiss the aggravated kidnapping charges, arguing that the movement
5 of the victims was not substantial and did not increase the risk of
6 harm to the victims. Counsel acknowledged that California law on the
7 asportation requirement for kidnapping for the purpose of robbery was
8 "very confusing," but relied on cases holding that the movement of a
9 robbery victim for the sole purpose of facilitating the robbery did
10 not show the requisite asportation (C.T. 105-09). The prosecution
11 filed a written opposition to the motion (C.T. 121-29).

12
13 On July 19, 2004, the court held a hearing on the motion (C.T.
14 131). The record does not contain the transcript of the hearing, but
15 does reflect that the court granted the motion and dismissed the two
16 aggravated kidnapping counts on July 22, 2004 (C.T. 133). On that
17 same date, the California Court of Appeal, Second Appellate District,
18 issued its decision in People v. Aguilar, 120 Cal. App. 4th 1044, 16
19 Cal. Rptr. 3d 231 (2004) ("Aguilar").

20
21 Voir dire commenced on September 21, 2004 (C.T. 146). On
22 September 23, 2004, counsel made opening statements and the
23 prosecution began presenting its case, calling several witnesses,
24 including Arm (C.T. 152). The record does not contain a transcript of
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28

1 these proceedings.⁴

2
3 As indicated above, September 24, 2004, pursuant to a plea
4 agreement, Petitioner pled no contest to the two robbery counts,
5 admitted the allegations that a principal was armed with a firearm in
6 the commission of the offenses, and admitted three prior prison term
7 allegations (R.T. 28-35).

8
9 **2. Governing Legal Standards**

10
11 "A guilty plea operates as a waiver of important rights, and is
12 valid only if done voluntarily, knowingly, and intelligently, with
13 sufficient awareness of the relevant circumstances and likely
14 consequences." Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005) (citation
15 and internal quotations omitted). "A plea is 'involuntary' if it is
16 the product of threats, improper promises, or other forms of wrongful
17 coercion [citation], and it is 'unintelligent' if the defendant is
18 without the information necessary to assess intelligently 'the
19 advantages and disadvantages of a trial as compared with those
20 attending a plea of guilty.'" United States v. Hernandez, 203 F.3d
21 614, 618-19 (9th Cir. 2000) (citations and footnote omitted).
22 Where a petitioner has entered a plea upon the advice of counsel, the
23 voluntariness of the plea depends on whether counsel provided

24
25
26 ⁴ Although the Supplemental Answer refers to the trial
27 testimony, citing to a "Lodged Doc. No. 2" (see, e.g.,
28 Supplemental Answer, p. 18), the record does not contain any
transcript of the trial. For purposes of the Court's analysis of
Petitioner's claims, however, the absence of a trial transcript
is immaterial.

1 effective assistance in advising the petitioner to enter the plea.
2 Hill v. Lockhart, 474 U.S. 52, 56-57 (1985).

3
4 In the context of a guilty plea, the analysis of counsel's
5 alleged ineffectiveness "depends as an initial matter, not on whether
6 a court would retrospectively consider counsel's advice to be right or
7 wrong, but on whether that advice was within the range of competence
8 demanded of attorneys in criminal cases." McMann v. Richardson, 397
9 U.S. 759, 771 (1970). In determining whether Petitioner's counsel
10 acted ineffectively, the Court employs the standards set forth in
11 Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984)
12 ("Strickland").⁵

13
14 To establish ineffective assistance of counsel, Petitioner must
15 prove: (1) counsel's representation fell below an objective standard
16 of reasonableness; and (2) there is a reasonable probability that, but
17 for counsel's errors, the result of the proceeding would have been
18

19 ⁵ The Court rejects Petitioner's contention that the
20 presumed prejudice rule of United States v. Cronic, 466 U.S. 648
21 (1984), applies here. Petitioner alleges no actual conflict of
22 interest affecting counsel's capacity to give undivided loyalty
23 to his client's interests. See Stenson v. Lambert, 504 F.3d 873,
24 886 (9th Cir. 2007). No clearly established Supreme Court law
25 extends the presumed prejudice rule to the circumstances
26 presented here. See Mickens v. Taylor, 535 U.S. 162, 174-75
27 (2002) (declining to approve application of presumed prejudice
28 rule to conflicts other than those caused by joint
representation); Stenson v. Lambert, 504 F.3d at 886 (no clearly
established Supreme Court law holds that a disagreement between
defendant and his counsel creates an actual conflict of interest
within the meaning of Cronic); Foote v. Del Papa, 492 F.3d 1026,
1030 (9th Cir.), cert. denied, 128 S. Ct. 808 (2007) (Supreme
Court has never held that presumed prejudice rule applies to a
conflict between defendant and his or her counsel).

1 different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697
2 (1984) ("Strickland"). A reasonable probability of a different result
3 "is a probability sufficient to undermine confidence in the outcome."
4 Id. at 694. To show Strickland prejudice in the context of a plea,
5 Petitioner "must show that there is a reasonable probability that, but
6 for counsel's errors, he would not have pleaded guilty and would have
7 insisted on going to trial." See Hill v. Lockhart, 474 U.S. 52, 59
8 (1985). The court may reject the claim upon finding either that
9 counsel's performance was reasonable or the claimed error was not
10 prejudicial. Id. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir.
11 2002) ("Failure to satisfy either prong of the Strickland test
12 obviates the need to consider the other.") (citation omitted). For
13 purposes of habeas review under 28 U.S.C. section 2254(d), Strickland
14 sets forth clearly established Federal law as determined by the United
15 States Supreme Court. See Williams v. Taylor, 529 U.S. at 391
16 (citation and quotations omitted).

17
18 Review of counsel's performance is "highly deferential" and there
19 is a "strong presumption" that counsel rendered adequate assistance
20 and exercised reasonable professional judgment. Williams v. Woodford,
21 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005)
22 (quoting Strickland, 466 U.S. at 689). The court must judge the
23 reasonableness of counsel's conduct "on the facts of the particular
24 case, viewed as of the time of counsel's conduct." Strickland, 466
25 U.S. at 690. The court may "neither second-guess counsel's decisions,
26 nor apply the fabled twenty-twenty vision of hindsight." Karis v.
27 Calderon, 283 F.3d 1117, 1130 (9th Cir. 2002), cert. denied, 539 U.S.
28 958 (2003) (citation and quotations omitted); see Yarborough v.

1 Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees
2 reasonable competence, not perfect advocacy judged with the benefit of
3 hindsight.") (citations omitted). The test is "only whether some
4 reasonable lawyer . . . could have acted, in the circumstances, as
5 defense counsel acted." Coleman v. Calderon, 150 F.3d 1105, 1113 (9th
6 Cir.) (citations and quotations omitted), rev'd on other grounds, 525
7 U.S. 141 (1998); see also Babbitt v. Calderon, 151 F.3d 1170, 1173-74
8 (9th Cir. 1998), cert. denied, 525 U.S. 1159 (1999) (relevant inquiry
9 under Strickland is not what defense counsel could have pursued, but
10 rather whether the choices made by defense counsel were reasonable)
11 (citation and quotations omitted); Morris v. California, 966 F.2d 448,
12 456-57 (9th Cir.), cert. denied, 506 U.S. 831 (1992) (if the court can
13 conceive of a reasonable tactical reason for counsel's action or
14 inaction, the court need not determine the actual explanation).
15 Petitioner bears the burden to "overcome the presumption that, under
16 the circumstances, the challenged action might be considered sound
17 trial strategy." Strickland, 466 U.S. at 689 (citation and quotations
18 omitted).

19 20 3. Discussion

21
22 Petitioner contends trial counsel assertedly "coerced" Petitioner
23 into pleading no contest by allegedly incorrectly advising Petitioner
24 that, if Petitioner did not accept the plea bargain, the Aguilar case
25 would permit the prosecutor to refile the aggravated kidnapping
26 charges and seek a life sentence. Petitioner's contention lacks
27 merit.

28 ///

1 The dismissal of the kidnapping for robbery charges pursuant to
2 California Penal Code section 995 did not prevent the prosecution from
3 refiling the dismissed charges. See Cal. Penal Code § 1387(a); People
4 v. Ghent, 43 Cal. 3d 739, 774, 239 Cal. Rptr. 82, 739 P.2d 1250
5 (1987), cert. denied, 485 U.S. 929 (1988); People v. Uhlemann, 9 Cal.
6 3d 662, 666-69, 108 Cal. Rptr. 657, 511 P.2d 609 (1973); De Anda v.
7 City of Long Beach, 7 F.3d 1418, 1422 & n.6 (9th Cir. 1993). A
8 California trial court has discretion to permit the amendment of an
9 Information to allege offenses established at the preliminary hearing,
10 even during trial, as long as the defendant's substantial rights are
11 not compromised. See People v. Jones, 164 Cal. App. 3d 1173, 1178,
12 211 Cal. Rptr. 167 (1985); Cal. Penal Code § 1009.

13
14 Counsel's fear that Aguilar could support aggravated kidnapping
15 charges against Petitioner was well-founded. "Kidnapping for robbery,
16 or aggravated kidnapping, requires movement of the victim that is not
17 merely incidental to the commission of the robbery, and which
18 substantially increases the risk of harm over and above that
19 necessarily present in the underlying crime itself." People v.
20 Rayford, 9 Cal. 4th 1, 12, 36 Cal. Rptr. 2d 317, 884 P.2d 1369 (1994)
21 (citations omitted; holding that the test for asportation on a charge
22 of kidnapping for robbery also applies to asportation on a charge of
23 kidnapping for the purpose of rape). "These two aspects are not
24 mutually exclusive, but interrelated." Id. In determining whether
25 the movement is merely incidental to the underlying crime,
26 consideration of the "scope and nature" of the movement is necessary.
27 Id. (citation and internal quotations omitted). "This includes
28 [consideration of] the actual distance a victim is moved." Id.

1 However, "there is no minimum number of feet a defendant must move a
2 victim in order to satisfy the first prong." Id. (citation omitted).
3 Consideration of whether the movement subjected the victim to a
4 substantial increase in risk of harm over and beyond that inherent in
5 the underlying crime "includes consideration of such factors as the
6 decreased likelihood of detection, the danger inherent in a victim's
7 foreseeable attempts to escape, and the attacker's enhanced
8 opportunity to commit additional crimes." Id. at 13 (citations
9 omitted).

10
11 In moving to dismiss the aggravated kidnapping charges,
12 Petitioner's counsel relied on People v. Hoard, 103 Cal. App. 4th 599,
13 126 Cal. Rptr. 2d 855 (2002) ("Hoard") (see C.T. 113-120). In Hoard,
14 the defendant entered a jewelry store, displayed a gun, ordered the
15 employees into a back office, tied them up, and began taking jewelry
16 from the cases. Hoard, 103 Cal. App. 4th at 602. When one employee
17 tried to call 911, the defendant returned to the office, threatened
18 the employees, disabled the office phone, and left the premises. Id.
19 The Court of Appeal, Fourth Appellate District, held that the movement
20 of the employees "served only to facilitate the crime with no other
21 apparent purpose." Id. at 607. The court rejected case law equating
22 an "incidental" movement with movement "necessary" to effectuate the
23 crime. Id. at 606-07. The court also ruled that the movement did not
24 substantially increase the risk of harm to the victims, because
25 removal from the public view did not, of itself, increase the risk of
26 harm. Id. The Hoard case criticized two earlier cases, People v.
27 Salazar, 33 Cal. App. 4th 341, 39 Cal. Rptr. 2d 337 (1995) (upholding
28 conviction for kidnapping for the purpose of rape where defendant

1 moved the victim 29 feet from an outside walkway to a motel bathroom),
2 and People v. Shadden, 93 Cal. App. 4th 164, 169, 112 Cal. Rptr. 2d
3 826 (2001) ("where a defendant moves a victim from a public place to a
4 place out of public view, the risk of harm is increased even if the
5 distance is short"; upholding conviction for kidnapping for purpose of
6 rape where defendant moved victim from front area of store in public
7 view nine feet into a closed back room). Hoard, 103 Cal. App. 4th at
8 605-07 (opining that Salazar and Shadden courts improperly confused
9 "incidental" with "necessary").

10
11 In Aguilar, decided on the day the court in Petitioner's case
12 dismissed the aggravated kidnapping counts, the defendant pulled the
13 victim 133 feet down the sidewalk to a dark, unlit area, where he
14 sexually assaulted her. Aguilar, 120 Cal. App. 4th at 1047. On
15 appeal, the defendant challenged the sufficiency of the evidence to
16 support his conviction for kidnapping for the purpose of rape. The
17 defendant relied on Hoard, arguing that the movement was solely to
18 facilitate rape, and hence was incidental to rape. Id. at 1050.

19
20 The Court of Appeal upheld the conviction, ruling that a
21 reasonable trier of fact could infer that the movement increased the
22 risk of harm to the victim by making it harder for her to escape and
23 by enhancing the opportunity to commit additional crimes. Id. at
24 1049-50. In so doing, the Aguilar Court criticized and declined to
25 follow Hoard. Aguilar, 120 Cal. App. 4th at 1051-52. The Aguilar
26 Court expressly rejected Hoard's criticism of People v. Salazar and
27 People v. Shadden. Id.

28 ///

1 A reasonable attorney could have believed that Aguilar supported
2 kidnapping for robbery charges in Petitioner's case. Aguilar well
3 might have led the trial court to reconsider its dismissal of the
4 aggravated kidnapping convictions, and to conclude that the evidence
5 at the preliminary hearing amply supported those charges. Counsel
6 reasonably could have feared that, in light of Aguilar, Petitioner's
7 movement of the victims from the front lounge area on two occasions
8 and to two different rooms in the building (the second an "isolation
9 room"), was not incidental to the robbery, but rather was for the
10 purposes of decreasing the likelihood of detection, preventing the
11 victims from escaping, and possibly committing other crimes.

12
13 Indeed, case law subsequent to Petitioner's trial confirms the
14 reasonableness of counsel's fear. In People v. Dominguez, 39 Cal. 4th
15 1141, 47 Cal. Rptr. 3d 575, 140 P.3d 866 (2006), cert. denied, 127 S.
16 Ct. 1491 (2007), the California Supreme Court cited People v. Aguilar
17 with approval as a case endorsing a "multifaceted, qualitative
18 evaluation rather than a simple quantitative assessment." People v.
19 Dominguez, 39 Cal. 4th at 1151-52. The court upheld a conviction for
20 kidnapping for rape where the defendant moved the victim from the side
21 of the road to a spot 25 feet away and 10 to 12 feet below the level
22 of the road, where it was unlikely any passing motorist would see her.
23 Id. at 1151-55. In People v. Corcoran, 143 Cal. App. 4th 272, 279-80,
24 48 Cal. Rptr. 3d 851 (2006), the court upheld a conviction for
25 kidnapping for robbery, where, after aborting their robbery plans, the
26 defendants moved the victims 10 feet to an office under threat of
27 death. The court distinguished the case before it from People v.
28 Hoard, on the ground that in the instant case the movement of the

1 victims did not serve to facilitate the attempted robbery, but rather
2 to decrease the risk of detection and to facilitate escape. Id. at
3 280; see also People v. James, 148 Cal. App. 4th 446, 454-55 & n.8,
4 55 Cal. Rptr. 3d 767 (2007) (rejecting argument that movement of
5 victim necessary to robbery is necessarily incidental; criticizing
6 Hoard for its asserted "logical error" in holding that, because a
7 movement unnecessary to kidnapping is not incidental thereto, the
8 inverse necessarily follows).

9
10 Given the prosecution's potential for refiling the aggravated
11 kidnapping charges, and the possibility that under Aguilar the court
12 could deem the evidence sufficient to satisfy the asportation
13 requirement for aggravated kidnapping, counsel's advice that
14 Petitioner accept a plea bargain calling for a ten-year prison term
15 rather than risk a life sentence for aggravated kidnapping was
16 reasonable advice. Petitioner has failed to show counsel
17 ineffectively "coerced" Petitioner to plead no contest.

18
19 **B. Claims of Pre-plea Ineffectiveness**

20
21 Petitioner contends his trial counsel assertedly failed to
22 investigate and subpoena potential defense witnesses concerning
23 Petitioner's asserted sales of cellphones, lied to potential defense
24 witnesses to discourage them from testifying, and failed to cross-
25 examine prosecution witnesses adequately (Pet. Mem., pp. 17-29; Pet.
26 Dec., p. 4). Petitioner's plea forecloses these claims.

27 ///

28 ///

1 Under California law, the legal effect of Petitioner's no contest
2 plea was the same as that accorded to a plea of guilty. See
3 California Penal Code § 1016; People v. Bradford, 15 Cal. 4th 1229,
4 1374-75, 65 Cal. Rptr. 2d 145, 939 P.2d 259 (1997), cert. denied, 523
5 U.S. 1118 (1998). A habeas petitioner who pleads guilty may only
6 attack the voluntary and intelligent nature of the plea. Tollett v.
7 Henderson, 411 U.S. 258, 267 (1973).

8
9 A plea of guilty and the ensuing conviction
10 comprehend all of the factual and legal elements
11 necessary to sustain a binding, final judgment of
12 guilt and a lawful sentence. Accordingly, when
13 the judgment of conviction upon a guilty plea has
14 become final and the offender seeks to reopen the
15 proceedings, the inquiry is ordinarily confined to
16 whether the underlying plea was both counseled and
17 voluntary. If the answer is in the affirmative,
18 then the conviction and the plea, as a general
19 rule, foreclose the collateral attack.

20
21 United States v. Broce, 488 U.S. 563, 569 (1989) (guilty pleas
22 foreclosed double jeopardy challenge to convictions); see also Tollett
23 v. Henderson, 411 U.S. at 267; United States v. Cazares, 121 F.3d
24 1241, 1246-48 (9th Cir. 1997) (guilty plea admits facts essential to
25 the validity of the conviction). Petitioner's plea of no contest
26 forecloses any claims of pre-plea ineffective assistance of counsel
27 not going to the validity of the plea, including Petitioner's claims
28 that counsel assertedly failed to investigate, discouraged witnesses

1 from testifying, or conducted allegedly inadequate cross-examinations.
2 See United States v. Friedlander, 217 Fed. App'x 664 (9th Cir. 2007)
3 (alleged ineffectiveness in connection with suppression motions waived
4 by plea);⁶ Moran v. Godinez, 57 F.3d 690, 700 (9th Cir. 1994), cert.
5 denied, 516 U.S. 976 (1995) (claim of ineffectiveness in failing to
6 prevent use of petitioner's confession at trial foreclosed by plea);
7 United States v. Bohn, 956 F.2d 208, 209 (9th Cir. 1992) (claim that
8 counsel was ineffective during *in camera* hearing foreclosed by plea);
9 Watkins v. Valadez, 2007 WL 512442 at *10-11 (E.D. Cal. Feb. 12,
10 2007), report and recommendation adopted, 2007 WL 776714 (E.D. Cal.
11 Mar. 12, 2007) (claims that counsel ineffectively failed to challenge
12 legality of arrest and failed to file a motion to dismiss pursuant to
13 California Penal Code section 995 foreclosed by plea); Rodgers v.
14 Finn, 2006 WL 3114303 at *6 (E.D. Cal. Nov. 1, 2006), report and
15 recommendation adopted, 2007 WL 177888 (E.D. Cal. Jan. 23, 2007)
16 (claim that counsel failed to investigate alibi defense foreclosed by
17 plea); United States v. Chavez, 2002 WL 31971945 at *3-4 (D. Or.
18 July 3, 2002) (alleged failure to file pretrial motions, to
19 investigate, to request discovery, and to cross-examine arresting
20 officers foreclosed by plea).

21
22 **C. Conclusion**
23

24 For all of the foregoing reasons, Petitioner has failed to show
25 he received constitutionally ineffective assistance of counsel.
26

27 ⁶ The Court may cite unpublished Ninth Circuit opinions
28 issued on or after January 1, 2007. See U.S. Ct. App. 9th Cir.
Rule 36-3(b); Fed. R. App. P. 32.1(a).

1 Therefore, the state courts' rejection of Petitioner's claims of
2 ineffective assistance of trial counsel was not contrary to, or an
3 objectively unreasonable application of, any clearly established
4 Federal law as determined by the United States Supreme Court. See 28
5 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on
6 these claims.

7
8 **II. Petitioner's Claim that the Trial Court Violated the Plea**
9 **Agreement By Ordering Restitution to the Victims Does Not Merit**
10 **Habeas Relief.**

11
12 **A. Introduction**

13
14 In 1982, the voters passed Proposition 8, the Victims' Bill of
15 Rights. Among other things, this Proposition amended the California
16 Constitution to provide that it is the "unequivocal intention of the
17 People of the State of California that all persons who suffer losses
18 as a result of criminal activity shall have the right to restitution
19 from the persons convicted of the crimes for losses they suffer," and
20 that restitution "shall be ordered from the convicted persons in every
21 case, regardless of the sentence or disposition imposed, in which a
22 crime victim suffers a loss, unless compelling and extraordinary
23 reasons exist to the contrary." Cal. Const., Art. I, § 28).
24 California Penal Code section 1202.4 implements this constitutional
25 provision. See People v. Allen, 88 Cal. App. 4th 986, 989-95, 106
26 Cal. Rptr. 3d 253 (2001) (describing legislative history).

27 ///

28 ///

1 California Penal Code section 1202.4(a)(1) expresses the intent
2 of the Legislature "that a victim of a crime who incurs any economic
3 loss as a result of the commission of a crime shall receive
4 restitution directly from any defendant convicted of that crime." The
5 section provides that, in addition to any other penalty provided or
6 imposed by law, the court "shall order" the defendant to pay both:
7 (a) a restitution fine; and (b) restitution to the victim or victims.
8 Cal. Penal Code § 1202.4(a)(3).

9
10 With respect to a restitution fine, the court "shall impose" such
11 a fine unless the court finds "compelling and extraordinary reasons"
12 for not doing so, and states those reasons on the record. Cal. Penal
13 Code §§ 1202.4(b), (c). The amount of the restitution fine "shall be
14 set at the discretion of the court and commensurate with the
15 seriousness of the offense," but shall not be less than \$200 nor more
16 than \$10,000. Cal. Penal Code § 1202.4(b)(1). The court may
17 determine the amount of the fine as the product of \$200 times the
18 number of years of imprisonment, multiplied by the number of felony
19 counts of which the defendant is convicted. Cal. Penal Code §
20 1202.4(b)(2). A defendant's inability to pay "shall not be considered
21 a compelling and extraordinary reason not to impose a restitution
22 fine," but may be considered in determining the amount of the fine.
23 Cal. Penal Code §§ 1202.4(c), (d). "[A] restitution fine is mandatory
24 even in the absence of a crime victim." People v. Hanson, 23 Cal. 4th
25 355, 362, 97 Cal. Rptr. 2d 58, 1 P.3d 650 (2000) (citations omitted).
26 The restitution fine is deposited in the Restitution Fund in the State
27 Treasury. See Cal. Penal Code § 1202.4(e). The California Victims'
28 Compensation Board is authorized to pay claims with monies deposited

1 in the Restitution Fund. See Cal. Gov't Code § 13950 et seq.

2
3 With respect to restitution to the victim, "victim restitution is
4 mandated by both the Constitution and section 1202.4." People v.
5 Rowland, 51 Cal. App. 4th 1745, 1751, 60 Cal. Rptr. 2d 351 (1997)
6 (citations omitted). Section 1202.4(f) provides that the court "shall
7 require" that the defendant pay such restitution to the victim, in an
8 amount based on the amount of loss claimed by the victim. Cal. Penal
9 Code § 1202.4(f). The amount of restitution includes "[f]ull or
10 partial payment for the value of stolen or damaged property." Cal.
11 Penal Code § 1202.4(f)(3)(A). "The court shall order full restitution
12 unless it finds compelling and extraordinary reasons for not doing so,
13 and states them on the record." Cal. Penal Code §§ 1202.4(f), (g).
14 "A defendant's inability to pay shall not be considered a compelling
15 and extraordinary reason not to impose a restitution order, nor shall
16 inability to pay be a consideration in determining the amount of a
17 restitution order." Cal. Penal Code § 1202.4(g). If the court fails
18 to order victim restitution where appropriate, "the sentence is
19 invalid." People v. Rowland, 51 Cal. App. 4th at 1751 (trial court
20 did not err in ordering victim restitution at resentencing; original
21 sentence which did not order such restitution was invalid).
22

23 California Penal Code section 1202.45 provides that, in every
24 case where the sentence includes a period of parole, a court "shall at
25 the time of imposing the restitution fine . . . assess an additional
26 parole revocation fine." The parole revocation fine shall be
27 suspended unless parole is revoked. Id.

28 ///

1 Thus, California law provides for three different assessments:
2 (1) a "restitution fine"; (2) "restitution" paid to the victim; and
3 (3) a parole revocation fine. See Yandell v. Horel, 2007 WL 1033471
4 at *3 (N.D. Cal. Apr. 4, 2007).⁷

5
6 **B. Factual Background**

7
8 On September 24, 2004, during trial, the court expressed its
9 understanding that the parties had reached a disposition (R.T. 28).
10 The court indicated that the prosecution would allege that a principal
11 was armed with a firearm with respect to each of the robbery counts,
12 and that Petitioner would enter a no contest plea to the robbery
13 counts, admit the new firearm allegations, admit three prior prison
14 term allegations, and receive a prison sentence of ten years and four
15 months (R.T. 28). The court indicated that it would defer the issue
16 of custody credits pending the receipt of more information (R.T. 28-
17 29). The following then occurred:

18
19 THE COURT: . . .

20
21 There will be a restitution fund fine and a parole
22 revocation fine with regard to restitution in this matter.

23 Is there any expectation that the People have that the
24

25 ⁷ California Penal Code section 1202.4(a)(2) also
26 provides for a fine in the form of a penalty assessment on any
27 underlying fine imposed for the offense. Restitution fines,
28 victim restitution and parole revocation fines are not subject to
this assessment. See Cal. Penal Code § 1202.4(e); People v.
Allen, 88 Cal. App. 4th at 992-93. In Petitioner's case the
court did not impose any such penalty assessment.

1 defendant is going to be able to pay restitution in this
2 case?⁸

3
4 [THE PROSECUTOR]: No, but I'd like it ordered.

5
6 THE COURT: I'll order restitution, but realistically
7 based on the nature of this theft, realistically there's
8 going to be no restitution paid.

9
10 The parole revocation fine and the restitution fund
11 fine, the minimum is \$200, the maximum is \$10,000. I'll
12 award an amount that's commensurate with what's instructed
13 in the Code. I'll take a look at it and then I'll let you
14 know.

15
16 Do you understand the agreement, Mr. White?

17
18 THE DEFENDANT: Yes.

19
20 THE COURT: Have I stated the agreement accurately in
21 accordance with the perception of the defendant?

22
23 [PETITIONER'S COUNSEL]: Yes.

24
25 ⁸ The transcript's punctuation of these two sentences
26 appears to be erroneous. Without the apparent punctuation
27 errors, sentences would read: "There will be a restitution fund
28 fine and a parole revocation fine. With regard to restitution in
this matter, is there any expectation that the people have that
the defendant is going to be able to pay restitution in this
case?"

1 (R.T. 29-30). Petitioner then waived his rights (R.T. 30-32). The
2 court advised Petitioner that the minimum restitution fine was \$200,
3 that the maximum was \$10,000, and that the court would "pick an amount
4 commensurate with what is set forth in the Code somewhere in the
5 ranges between the \$200 and \$10,000" (R.T. 32). Petitioner then
6 pleaded no contest to the two robbery counts, admitted the firearm
7 enhancement allegations, and admitted the prior prison term
8 allegations (R.T. 33-35). The court found the plea valid, accepted
9 the plea, and set sentencing for October 28, 2004 (R.T. 36-37).
10

11 On October 28, 2004, the prosecutor said that he had spoken with
12 Petitioner's counsel and that Petitioner's counsel had "agreed that
13 \$37,000 would be the stipulated amount for restitution paid to the
14 victims" (Sentencing R.T. 2). The court sentenced Petitioner to a
15 term of ten years and four months pursuant to the plea agreement
16 (Sentencing R.T. 11). The court ordered Petitioner to pay a
17 restitution fund fine of "\$200 per year in state prison or \$2,000
18 pursuant to [California Penal Code section] 1202.4," and imposed, but
19 suspended, a parole revocation fine of \$200 (Sentencing R.T. 12). The
20 court ordered Petitioner to pay restitution to the two victims in the
21 stipulated sum of \$37,000 (Sentencing R.T. 12). The court informed
22 Petitioner of his appellate rights, and asked whether he understood
23 those rights (Sentencing R.T. 12-13). Petitioner answered: "Yes."
24 (Sentencing R.T. 13). The court asked Petitioner if he understood
25 that, unless his present lawyer was going to file a notice of appeal,
26 it was Petitioner's obligation to do so within sixty days (Sentencing
27 R.T. 13-14). Petitioner answered: "Yes." (Sentencing R.T. 14). The
28 court said: "Any questions?" (Sentencing R.T. 14). Petitioner

1 answered: "No." (Sentencing R.T. 14).

2
3 **C. Discussion**

4
5 Petitioner contends the trial court breached the plea agreement
6 by ordering Petitioner to pay \$37,000 in restitution to the victims
7 (Pet. Mem., pp. 5-7, 22; Supplemental Reply, pp. 4-5). Petitioner
8 asserts he agreed, in the plea agreement, only to pay a restitution
9 fine in an amount between \$200 and \$10,000. This claim lacks merit.

10
11 When a guilty plea rests in any significant degree on an
12 agreement with the government, the agreement must be fulfilled.
13 Santobello v. New York, 404 U.S. 257, 262 (1971); Gunn v. Ignacio, 263
14 F.3d 965, 969 (9th Cir. 2001). The party asserting breach bears the
15 burden of proving the underlying facts establishing a breach. See
16 United States v. Laday, 56 F.3d 24, 26 (5th Cir. 1995); United States
17 v. Packwood, 848 F.2d 1009, 1011 (9th Cir. 1988). "Plea agreements
18 are contractual in nature and are measured by contract law standards."
19 Brown v. Poole, 337 F.3d 1155, 1159 (9th Cir. 2003) (citation and
20 quotations omitted).

21
22 If the language of a plea agreement is clear, that language
23 governs. People v. Shelton, 37 Cal. 4th 759, 767, 37 Cal. Rptr. 3d
24 354, 125 P.3d 290 (2006) (citation omitted). If the terms are
25 ambiguous, the agreement "must be interpreted in the sense in which
26 the promisor believed, at the time of making it, that the promisee
27 understood it." Id. (citations and internal quotations omitted). In
28 interpreting a plea agreement, "[t]he mutual intention to which the

1 courts give effect is determined by objective manifestations of the
2 parties' intent, including the words used in the agreement, as well as
3 extrinsic evidence of such objective matters as the surrounding
4 circumstances under which the parties negotiated or entered into the
5 contract; the object, nature and subject matter of the contract; and
6 the subsequent conduct of the parties." Id. (citations and internal
7 quotations omitted). "[T]he critical consideration is whether the
8 challenged [term] was within the defendant's contemplation and
9 knowledge when he entered his plea." People v. Knox, 123 Cal. App.
10 4th 1453, 1460, 20 Cal. Rptr. 3d 877 (2004) (citation and internal
11 quotations omitted).

12
13 Contrary to Petitioner's assertions, the record shows that the
14 plea agreement contemplated a sentence that would include victim
15 restitution. Prior to taking the plea, the court indicated it would
16 impose: (1) a restitution fund fine in a sum between \$200 and \$10,000;
17 (2) a parole revocation fine; and (3) victim restitution. The court
18 first told Petitioner there would be a restitution fine and a parole
19 revocation fine (R.T. 29). The court then stated it would order
20 "restitution," noting that "[r]ealistically" there would be no
21 restitution paid (R.T. 29).⁹ The court next stated that the amount of
22 both the restitution fine and the parole revocation fine would be
23 between \$200 and \$10,000 (R.T. 29-30). The court did not say that the
24 "restitution" it would order based on the theft was so limited in
25 amount. Although there is some arguable ambiguity in the record, it

26
27 ⁹ The court did not say Petitioner lacked the ability to
28 pay, but only expressed the view that the restitution would not
be paid.

1 seems apparent that the "restitution" referenced by the court was
2 victim restitution. Indeed, because victim restitution was mandated
3 by the California Constitution and by statute, the parties could not
4 dispense with victim restitution in a plea agreement. See People v.
5 McClellan, 6 Cal. 4th 367, 380, 24 Cal. Rptr. 2d 739, 862 P.2d 739
6 (1993) (statutorily mandated sex offender registration requirement
7 "was an inherent incident of defendant's decision to plead guilty . .
8 . and was not added 'after' the plea agreement was reached"); People
9 v. Walker, 54 Cal. 3d 1013, 1027-29, 1 Cal. Rptr. 2d 902, 819 P.2d 861
10 (1991) (because restitution fine is mandated by statute, remedy for
11 breach of plea agreement which did not include any agreement to pay
12 restitution fine is to reduce fine to the statutory minimum, where
13 breach issue is first raised after sentencing); People v. Rowland,
14 51 Cal. App. 4th at 1751-52 ("victim restitution is mandatory and a
15 sentence without such an award is unlawful").

16
17 The subsequent words and conduct of the attorneys and Petitioner
18 confirm the understanding that a sentence under the plea agreement
19 would include victim restitution. See People v. Dickerson, 122 Cal.
20 App. 4th 1374, 1385, 19 Cal. Rptr. 3d 545 (2004) (failure of defendant
21 or his attorney to object to restitution fine at sentencing showed
22 imposition of fine did not violate plea agreement). Prior to taking
23 Petitioner's plea, the court asked if it had omitted anything, and
24 both the prosecutor and Petitioner's counsel answered in the negative
25 (R.T. 30). As indicated above, Petitioner affirmed that he was
26 entering the plea freely and voluntarily, and did not raise the issue
27 of victim restitution. At sentencing, neither Petitioner nor his
28 attorney objected when the prosecutor told the court that Petitioner's

1 counsel had stipulated to victim restitution in the sum of \$37,000
2 (see Sentencing R.T. 2). Neither Petitioner nor his counsel objected
3 when the court imposed the \$37,000 victim restitution. When the court
4 questioned Petitioner concerning whether he understood his appellate
5 rights, Petitioner did not raise the issue of the \$37,000 victim
6 restitution. At the conclusion of the proceedings, when the court
7 asked Petitioner if he had any questions, Petitioner answered: "No."
8 (Sentencing R.T. 14).

9
10 Under these circumstances, the record shows Petitioner pled no
11 contest with the objective understanding that the court would impose
12 victim restitution. Dubious allegations of contrary subjective
13 expectations are irrelevant. See Buckley v. Terhune, 441 F.3d 688,
14 695 (9th Cir. 2006), cert. denied, 127 S. Ct. 2094 (2007) (in
15 determining intent of parties with respect to plea bargain, "the
16 relevant intent is objective, . . . not a party's subjective intent")
17 (citations and quotations omitted); Calabrese v. United States, 507
18 F.2d 259, 260 (1st Cir. 1974) (unless the defendant affirmatively was
19 misled by the prosecutor, or the court failed to inquire sufficiently
20 regarding the plea, the court "cannot look into the subjective mental
21 set of [the defendant] to see to what extent misconceptions [regarding
22 the sentence] played a part in his guilty plea"); United States ex
23 rel. Curtis v. Zelker, 466 F.2d 1092, 1098 (2d Cir. 1972), cert.
24 denied, 410 U.S. 945 (1973) ("subjective mistaken impression" does not
25 require withdrawal of plea; "to justify the issuance of a federal writ
26 vacating his guilty plea, the petitioner must bear the burden of
27 showing that the circumstances as they existed at the time of the
28 plea, judged by objective standards, reasonably justified his mistaken

1 impression") (emphasis added); United States v. Collado-Gomez, 674 F.
2 Supp. 426, 428 (E.D.N.Y. 1987), aff'd, 854 F.2d 1315 (2d Cir. 1988)
3 (defendant's subjective mistaken belief "unsupported by any promise
4 from the government or indications from the Court is insufficient to
5 invalidate a guilty plea"); In re Honesto, 130 Cal. App. 4th 81, 92,
6 29 Cal. Rptr. 3d 653 (2005) ("[a] plea agreement violation claim
7 depends upon the actual terms of the agreement, not the subjective
8 understanding of the defendant"); see generally 16A Fed. Proc. L. Ed.
9 § 41:435 (2007) ("the applicant's subjective belief as to the severity
10 of the sentence, unsupported by any promises from the government or
11 indications from the court" cannot support collateral relief)
12 (footnote omitted).

13
14 Although, as indicated above, the law precludes parties from
15 agreeing that no victim restitution will be ordered, the parties may
16 negotiate concerning the amount of restitution. See People v.
17 Crandell, 40 Cal. 4th 1301, 1309, 57 Cal. Rptr. 3d 349, 156 P.3d 364
18 (2007), cert. denied, 128 S. Ct. 258 (2007); People v. Walker, 54 Cal.
19 3d at 1027-28. Nothing in the record shows the parties agreed, in the
20 plea agreement, to any specific amount of, or cap on, victim
21 restitution.¹⁰ Despite Petitioner's apparent contention to the
22 contrary, the court clearly informed Petitioner that the amount of the
23 restitution fine was limited to a maximum of \$10,000. Neither the
24 court nor the attorneys said anything concerning a limit on the amount
25

26
27 ¹⁰ Petitioner's argument that the parties agreed to a
28 \$10,000 cap on victim restitution confuses the restitution fine,
which was subject by law to such a cap, with victim restitution,
which was not.

1 of victim restitution. By statute, the court was required to order
2 "full" victim restitution in the absence of "compelling and
3 extraordinary" reasons not to do so. See Cal. Penal Code § 1202.4(g).
4 The parties evidently intended the amount of restitution to be set by
5 the court or (as eventually occurred) by stipulation. See People v.
6 Crandell, 40 Cal. 4th at 1309-10 (no breach of plea agreement where
7 record showed the parties intended to leave the amount of restitution
8 fine to the discretion of the court; court "flatly informed" defendant
9 that he would be ordered to pay victim restitution); People v. Knox,
10 123 Cal. App. 4th at 1461 (fact that precise amount of restitution
11 fine was not specified prior to entry of plea showed defendant
12 recognized the amount of the fine would be left to the sentencing
13 judge).¹¹

14
15 In sum, the imposition of victim restitution in the sum of
16 \$37,000 did not violate Petitioner's plea agreement. Therefore, the
17 state courts' rejection of this claim was not contrary to, or an
18 objectively unreasonable application of, any clearly established
19 Federal law as determined by the United States Supreme Court. See 28
20 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on his
21 claim alleging a breach of his plea agreement.

22 ///

23 ///

24 ///

25
26 ¹¹ Petitioner's related contention that he lacked notice
27 that the victim restitution could exceed \$10,000 is without
28 merit. Petitioner knew, from Arm's preliminary hearing testimony
if from no other source, that the claimed value of the stolen
property was approximately \$45,000 (C.T. 52).

1 **III. Petitioner's Claim that the Trial Court Improperly Failed to**
2 **Determine Petitioner's Ability to Pay Restitution Does Not Merit**
3 **Habeas Relief.**
4

5 Petitioner contends that the trial court violated state law by
6 failing to make findings regarding Petitioner's ability to pay
7 restitution, and by failing sua sponte to order a hearing on
8 Petitioner's ability to pay (Pet. Mem., pp. 27-28). For several
9 reasons, these claims do not warrant habeas relief.
10

11 First, a state prisoner may obtain federal habeas relief "only on
12 the ground that he is in custody in violation of the Constitution or
13 laws or treaties of the United States." 28 U.S.C. § 2254(a). A
14 restitution order does not satisfy section 2254(a)'s "in custody"
15 requirement. Dremann v. Francis, 828 F.2d 6, 7 (9th Cir. 1987)
16 (fine); Flores v. Hickman, ___ F. Supp. 2d ___, 2008 WL 342748 at *13
17 (C.D. Cal. Jan. 25, 2008) (victim restitution order); Cejas v. Yates,
18 2008 WL 115387 at *1 (E.D. Cal. Jan. 10, 2008), report and
19 recommendation adopted, 2008 WL 483329 (E.D. Cal. Feb. 20, 2008)
20 (restitution fine); Tucker v. Carey, 2006 WL 902565 at *1 (E.D. Cal.
21 Apr. 5, 2006), report and recommendation adopted, 2006 WL 2601427
22 (E.D. Cal. Sept. 11, 2006) (challenge to victim restitution order on
23 grounds that court did not hold hearing and that petitioner had no
24 ability to pay restitution); see also United States v. Thiele, 314
25 F.3d 399, 401-02 (9th Cir. 2002), cert. denied, 540 U.S. 839 (2003)
26 (challenge to restitution order does not satisfy "in custody"
27 requirement of 28 U.S.C. section 2255; court may not entertain such a
28 claim, regardless of whether movant asserts other cognizable claims).

1 As Petitioner is not "in custody" by reason of the restitution orders,
2 this Court lacks habeas jurisdiction to entertain a challenge to those
3 orders. See 28 U.S.C. § 2254(a).

4
5 Second, federal habeas corpus relief may be granted "only on the
6 ground that [Petitioner] is in custody in violation of the
7 Constitution or laws or treaties of the United States." 28 U.S.C. §
8 2254(a). Mere errors in the application of state law are not
9 cognizable on habeas corpus. Estelle v. McGuire, 502 U.S. 62, 67-68
10 (1991). Matters relating to sentencing and serving of a sentence
11 generally are governed by state law and do not raise a federal
12 constitutional question. See Miller v. Vasquez, 868 F.2d 1116, 1118-
13 19 (9th Cir. 1989) (holding that question of whether particular prior
14 conviction qualifies for sentence enhancement under California law is
15 not cognizable on federal habeas corpus); see also Middleton v. Cupp,
16 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U.S. 1021
17 (1986) (federal habeas relief "unavailable for alleged error in the
18 interpretation or application of state law"); Sturm v. California
19 Adult Authority, 395 F.2d 446, 448 (9th Cir. 1967), cert. denied, 395
20 U.S. 947 (1969) ("a state court's interpretation of its [sentencing]
21 statute does not raise a federal question"). "[S]tate courts are the
22 ultimate expositors of state law." Mullaney v. Wilbur, 421 U.S. 684,
23 691 (1975); see also Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th
24 Cir.), cert. denied, 493 U.S. 942 (1989). Petitioner's claims that
25 the trial court committed state law error in issuing the restitution
26 orders state no cognizable claim for federal habeas relief. See Ortiz
27 v. Henry, 2006 WL 2845649 at *8 (N.D. Cal. Oct. 2, 2006) (challenge to
28 restitution order not cognizable on federal habeas review); Tucker v.

1 Carey, 2006 WL 902565 at *2 (challenge to victim restitution order on
2 grounds that court did not hold hearing and that petitioner had no
3 ability to pay restitution alleged only state law claims not
4 cognizable on federal habeas review).

5
6 Under narrow circumstances, however, the misapplication of state
7 sentencing law may violate due process. See Richmond v. Lewis, 506
8 U.S. 40, 50 (1992). "[T]he federal, constitutional question is
9 whether [the error] is so arbitrary or capricious as to constitute an
10 independent due process" violation. Id. (internal quotation and
11 citation omitted); see also Christian v. Rhode, 41 F.3d 461, 469 (9th
12 Cir. 1994) ("Absent a showing of fundamental unfairness, a state
13 court's misapplication of its own sentencing laws does not justify
14 federal habeas relief.").

15
16 No such fundamental unfairness occurred here. As indicated
17 above, by statute Petitioner's ability to pay the restitution fine and
18 victim restitution was irrelevant to the issue whether a restitution
19 fine or victim restitution was appropriate. Cal. Penal Code §§ 1202.4
20 (c), (d), (g). Petitioner's ability to pay was relevant to the issue
21 of the amount of the restitution fine, but was not relevant to the
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1 issue of the amount of the victim restitution. Id.¹² The court had
2 no obligation to make any express findings concerning Petitioner's
3 ability to pay in determining the amount of the restitution fine. See
4 Cal. Penal Code § 1202.4(d) ("Express findings by the court as to the
5 factors bearing on the amount of the [restitution] fine shall not be
6 required."); People v. Lawson, 69 Cal. App. 4th 29, 38 n.7, 81 Cal.
7 Rptr. 2d 283 (1999).¹³ The court had no obligation to hold a separate
8 hearing on the restitution fine. See Cal. Penal Code § 1202.4(d) ("A
9 separate hearing for the fine shall not be required.").¹⁴ Although
10 Petitioner could have requested a hearing on the amount of victim
11 restitution, see Cal. Penal Code § 1202.4(f)(1), the court could not
12 consider Petitioner's ability to pay in determining that amount. See

15 ¹² People v. Hartley, 163 Cal. App. 3d 126, 209 Cal. Rptr.
16 131 (1984), cited by Petitioner, concerned restitution imposed as
17 a condition of probation under former California Penal Code
18 section 1203.04. In 1995, the California Legislature repealed
19 section 1203.04 and incorporated its subject matter into
20 California Penal Code section 1202.4. See People v. Birkett, 21
21 Cal. 4th 226, 231 n.2, 87 Cal. Rptr. 2d 205, 980 P.2d 912 (1999).
22 As indicated above, California Penal Code section 1202.4(g)
23 expressly provides that ability to pay may not be considered in
24 determining whether to impose victim restitution, thus
25 superseding any alleged statement to the contrary in cases such
26 as People v. Hartley.

27 ¹³ Notably, the court did not impose anywhere near the
28 maximum possible restitution fine of \$10,000, suggesting the
court did consider Petitioner's ability to pay in setting the
restitution fine at \$2,000.

¹⁴ Section 1202.4(d) establishes a presumption that the
defendant has the ability to pay, and places the burden on the
defendant to show a lack of ability. See People v. Romero, 43
Cal. App. 4th 440, 449, 51 Cal. Rptr. 2d 26 (1996). Petitioner
never attempted to show the sentencing court that he lacked the
ability to pay the restitution fine.

1 Cal. Penal Code § 1202.4(g).¹⁵ Therefore, Petitioner has not shown
2 the court erred in the manner suggested by Petitioner.

3
4 For all of the foregoing reasons, the state courts' rejection of
5 this claim was not contrary to, or an objectively unreasonable
6 application of, any clearly established Federal law as determined by
7 the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner
8 is not entitled to habeas relief on this claim.

9
10 **IV. Petitioner's Claims of Ineffective Assistance of Appellate**
11 **Counsel Do Not Merit Habeas Relief.**

12
13 The standards set forth in Strickland govern claims of
14 ineffective assistance of appellate counsel. See Smith v. Robbins,
15 528 U.S. 259, 285-86 (2000); Bailey v. Newland, 263 F.3d 1022, 1028
16 (9th Cir. 2001), cert. denied, 535 U.S. 995 (2002). "A failure to
17 raise untenable issues on appeal does not fall below the Strickland
18 standard." Turner v. Calderon, 281 F.3d 851, 872 (9th Cir. 2002); see
19 Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001) (appellate
20 counsel's failure to raise an issue on direct appeal cannot constitute
21 ineffective assistance when "appeal would not have provided grounds
22 for reversal.").

23 ///

24
25 ¹⁵ Although the Constitution may prevent a state from
26 incarcerating a defendant for failure to pay court-ordered
27 restitution which the defendant in good faith has no ability to
28 pay, see Bearden v. Georgia, 461 U.S. 660, 668-69 (1983),
Petitioner was not incarcerated for failure to comply with any
such order.

1 Petitioner faults appellate counsel for failing to raise on
2 appeal the claim that the trial court assertedly violated the plea
3 agreement by ordering Petitioner to pay \$37,000 in restitution to the
4 victim. Petitioner attaches to his Supplemental Reply a letter from
5 appellate counsel, dated January 31, 2006, in which appellate counsel
6 advised Petitioner that it was too late to challenge the victim
7 restitution order on appeal, and that Petitioner probably could not do
8 so anyway because he agreed to the amount (Supplemental Reply, Ex. B,
9 pp. 2-3). Appellate counsel also cautioned Petitioner against raising
10 any such claim in a habeas corpus petition, opining that if Petitioner
11 won, the Supreme Court likely would order the entire plea withdrawn,
12 exposing Petitioner to a trial and a potentially lengthy sentence
13 (id.).
14

15 For the reasons discussed in Section II above, appellate counsel
16 reasonably could conclude that Petitioner would not succeed in
17 overturning the victim restitution order because Petitioner had agreed
18 to it. For the same reasons, Petitioner has not shown a reasonable
19 probability that, had appellate counsel raised this claim on appeal,
20 the outcome on appeal would have been any different.
21

22 Petitioner also contends appellate counsel ineffectively failed
23 to raise on appeal Petitioner's claims of ineffective assistance of
24 trial counsel, i.e., Petitioner's claims that trial counsel allegedly
25 failed to investigate and subpoena potential defense witnesses
26 concerning Petitioner's asserted sales of cellphones, allegedly lied
27 to potential defense witnesses to discourage them from testifying, and
28 allegedly conducted ineffective cross-examinations. However,

1 appellate counsel reasonably could have determined that, with one
2 possible exception discussed below, none of these claims could be
3 brought on direct appeal.

4
5 Where analysis of a claim of ineffective assistance of trial
6 counsel requires recourse to matters outside the appellate record,
7 California law requires that the claim be asserted in a petition for
8 writ of habeas corpus, not on direct appeal. See, e.g., People v.
9 Mendoza Tello, 15 Cal. 4th 264, 267-68, 62 Cal. Rptr. 2d 437, 933 P.2d
10 1134 (1997); People v. Pope, 23 Cal. 3d 412, 426-28, 152 Cal. Rptr.
11 732, 590 P.2d 859 (1979). "[B]ecause, in general, it is inappropriate
12 for an appellate court to speculate as to the existence or
13 nonexistence of a tactical basis for a defense attorney's course of
14 conduct when the record on appeal does not illuminate the basis for
15 the attorney's challenged acts or omissions, a claim of ineffective
16 assistance is more appropriately made in a habeas corpus proceeding,
17 in which the attorney has the opportunity to explain the reasons for
18 his or her conduct." People v. Wilson, 3 Cal. 4th 926, 936, 13 Cal.
19 Rptr. 2d 259, 838 P.2d 1212 (1992), cert. denied, 507 U.S. 1006
20 (1993); see also People v. Frye, 18 Cal. 4th 894, 979-80, 77 Cal.
21 Rptr. 2d 25, 959 P.2d 183 (1998), cert. denied, 526 U.S. 1023 (1999)
22 (citations and internal quotations omitted) ("a reviewing court will
23 reverse a conviction on the ground of inadequate counsel only if the
24 record on appeal affirmatively discloses that counsel had no rational
25 tactical purpose for his act or omission") (citations and internal
26 quotations omitted).

27 ///

28 ///

1 Here, appellate counsel reasonably could have determined that
2 claims that trial counsel failed to interview and subpoena witnesses,
3 lied to witnesses, and failed to conduct an adequate cross-examination
4 of a witness who allegedly painted Petitioner's Cadillac Escalade (and
5 assertedly not the Toyota truck) would require support outside the
6 appellate record, and hence could not be brought on direct appeal.
7 Petitioner cannot claim ineffective assistance of appellate counsel in
8 failing to raise these issues in a habeas corpus petition, for
9 Petitioner enjoyed no right to counsel in state post-conviction
10 proceedings. See Murray v. Giaratano, 492 U.S. 1, 7-10 (1989);
11 Pennsylvania v. Finley, 481 U.S. 551, 556 (1987); Wainwright v. Torna,
12 455 U.S. 586, 587-88 (1982); Cook v. Schriro, ___ F.3d ___, 2008 WL
13 441825 at *18 (9th Cir. Feb. 20, 2008).

14
15 Arguably, Petitioner's claim that trial counsel failed to cross-
16 examine a prosecution witness to elicit the admission that the witness
17 assertedly was Petitioner's parole officer would not have required
18 proof outside the appellate record. The record shows that, prior to
19 trial, and following an unreported conference with counsel, the court
20 ruled that the parole officer could testify but neither side could
21 adduce evidence concerning what she did for a living (R.T. 20). It is
22 unclear whether this ruling came at the request of Petitioner's
23 counsel. In any event, however, appellate counsel reasonably could
24 have concluded that trial counsel's failure to elicit the admission
25 represented sound trial strategy. Trial counsel reasonably could have
26 believed that it would be best for Petitioner if the jury were not
27 told (or not reminded) that Petitioner had a parole officer.

28 ///

1 For the foregoing reasons, the state courts' rejection of
2 Petitioner's claims of ineffective assistance of appellate counsel was
3 not contrary to, or an objectively unreasonable application of, any
4 clearly established Federal law as determined by the United States
5 Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled
6 to habeas relief on his claims of ineffective assistance of appellate
7 counsel.

8
9 **RECOMMENDATION**

10
11 For the foregoing reasons, IT IS RECOMMENDED that the Court issue
12 an Order: (1) approving and adopting this Report and Recommendation;
13 and (2) denying and dismissing the Petition with prejudice.

14
15 DATED: March 21, 2008.

16
17 _____/s/
18 CHARLES F. EICK
19 UNITED STATES MAGISTRATE JUDGE
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NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.